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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NOS. 38316 & 38317
	)	
v.	)	
	)	
EDWARD R. HOCHREIN, JR.,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

HONORABLE CARL B. KERRICK
District Judge

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Supreme Court Court of Appeals
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STATEMENT OF THE CASE

Nature of the Case

There is no dispute in this appeal that, as an essential element of the State's charge against Edward Hochrein of felony violation of a no contact order, an essential element of the State's burden of proof was that Mr. Hochrein had prior notice of the underlying no contact order. However, the State asks this Court to find that the stipulation that a no contact order was "in effect" at the time of the alleged contact subsumed an additional stipulation that Mr. Hochrein also had notice of the order. This Reply Brief is necessary to clarify that, under governing law, the language in the stipulation regarding the underlying order being "in effect," went to the duration of the no contact order, which is a separate factual issue than whether Mr. Hochrein had notice of it. Because the stipulation never included any provision as to the separate issue of notice, there was no evidentiary basis to support a jury finding of prior notice. Accordingly, there was insufficient evidence to support Mr. Hochrein's conviction for felony violation of a no contact order. For the same reason, the district court's omission of this essential element of notice from the jury instructions in this case was not harmless.

While Mr. Hochrein continues to assert that the district court erred when it granted the State's motion in limine to preclude Mr. Hochrein from impeaching Ms. Lewis with evidence of her prior conviction for felony possession of a financial transaction card, he will rely on the arguments contained within his Appellant's Brief, and will not reiterate those arguments herein.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Hochrein's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

1. Was there insufficient evidence to support the State's charge of felony violation of a no-contact order under I.C. § 18-920?

2. Were the district court's jury instructions defining the elements of the offense of violation of a no-contact order fatally deficient because these instructions omitted the essential element requiring the State to prove that Mr. Hochrein had prior notice of the no-contact order he was alleged to have violated?

ARGUMENT

I.

There Was Insufficient Evidence To Support The State's Charge Of Felony Violation Of A No-Contact Order Under I.C. § 18-920

There is no dispute in this case that, as part of the State's charge of felony violation of a no-contact order, the State was required to prove beyond a reasonable doubt that Mr. Hochrein had prior notice of the underlying no-contact order. (*See* Appellant's Brief, pp.12-20; Respondent's Brief, pp.7-8.) The State further does not dispute that, outside of the factual stipulation entered into by the parties, there was no evidence presented by the State that would establish this element. (Respondent's Brief, pp.7-12.) Therefore, the core issue for this Court's resolution is whether the language contained within the factual stipulation entered into in this case, that the underlying no-contact order was "in effect" at the time of the alleged contact, is a stipulation of fact relating to whether Mr. Hochrein had notice of the order. Mr. Hochrein submits that, in light of pertinent legal authority, it is not. Rather, the language of the parties stipulating that the no-contact order was "in effect" relates to a separate legal requirement as part of the State's burden of proof: that the duration of the no-contact had not expired as of the time of the alleged contact.

The State acknowledges that the word "notice" is nowhere evident from the stipulation entered into evidence in this case. (Respondent's Brief, p.9.) But the State asks this Court to interpret the language in the parties' stipulation that the no contact order was "in effect" to subsume a stipulation of notice. However, a review of the record in this case and pertinent case law belies the State's argument.

The language that the State seeks to invoke is related directly to the term in the underlying no contact order in this case that governs the **duration** of the no-contact order, not whether any notice of the order was given to Mr. Hochrein. State's Exhibit 4, originally presented at the preliminary hearing, is the underlying no-contact order in this case; and this order contains the following provision:

> VIOLATION OF THIS ORDER IS A SEPARATE CRIME UNDER Idaho Code 18-920 for which bail will be set by a judge; it is subject to a penalty of up to one year in jail and up to a $1,000 fine. THIS ORDER CAN ONLY BE MODIFIED BY A JUDGE **AND WILL REMAIN IN EFFECT** UNTIL 11:59 P.M. ON 3/14/11, OR UNTIL THIS CASE IS DISMISSED.

Consolidated Exhibits, p.6; Preliminary Hearing Exhibit 4 (emphasis added).

The above-referenced language subsumes the date of termination – and therefore the duration, of the no-contact order as is required under I.C.R. 46.2 and pertinent case law. And a review of the case law regarding criminal no-contact orders further reflects that the language regarding the no-contact order being "in effect" in this case refers to the fact that the order had not expired at the time of the alleged contact, rather than referring to whether Mr. Hochrein had notice of the order's existence.

At the time that I.C.R. 46.2 was adopted in 2002 to govern the issuance of criminal no-contact orders, the rule contained language that, "[t[he no contact order will remain **in effect** until further order of the court." *See State v. Castro*, 145 Idaho 173, 175 (2008). This result ultimately proved undesirable. As was noted by the Court in *Castro*:

> Unless and until a party brought the matter back before the court, a no contact order remained **in effect**. This enshrined perpetuity resulted in confusion, false arrests, and lawsuits.

Id. (emphasis added).

In response to the undesirable consequences of such an order without any discernible date of termination, the Court modified I.C.R. 46.2 to now require that there be a definite date of termination for criminal no-contact orders. Now, rather than being **in effect** – or of a duration – that could extend into perpetuity, no-contacts orders now must be in effect only for a stated period of time. *See also State v. Cobler*, 148 Idaho 769, 772 (2010). In order to be "in violation" of the order, which is a **separate** element from having prior notice of the order, the State must then show that the order was not yet expired – was **in effect** – at the time of the alleged contact. *See* ICJI 1282 (setting forth that the defendant had contact with the named person "in violation of the order" as a separate element than that the defendant had prior notice of the order).

Therefore, the language employed within the stipulation in this case was in direct reference to a separate element under the State's burden of proof: i.e. that the defendant had contact with the named person in violation of the court's order. Given that every criminal no-contact order must contain a date of termination, after which the order is no longer effective, the State was likewise required to prove that the order was still in effect at the time of the alleged contact – meaning that the order had not terminated by the time the alleged contact occurred.

At base, the State's argument confuses the issue of **enforceability** of the order with when, and for how long, the order is "in effect." While a violation of a no-contact order may only be enforced against the defendant, through arrest or the ultimate imposition of criminal punishment, where prior notice has been had, the order itself goes into effect once it is entered by the district court and the order remains in effect until the

date of termination lapses. *See Cobler*, 148 Idaho 772; *Castro*, 145 Idaho 175-176; I.C. § 18-920(4).

II.

The District Court's Jury Instructions Defining The Elements Of The Offense Of Violation Of A No-Contact Order Were Fatally Deficient Because These Instructions Omitted The Essential Element Requiring The State To Prove That Mr. Hochrein Had Prior Notice Of The No-Contact Order He Was Alleged To Have Violated

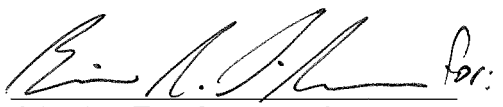
The State has further conceded that Mr. Hochrein has established the first two prongs of the fundamental error test given the omission of the essential element of notice from the elements instruction in this case in light of the Idaho Supreme Court Opinion in *State v. Draper*, 151 Idaho 576 (2011). (Respondent's Brief, pp.13-15.) The sole argument raised by the State is that the instructional error was harmless beyond a reasonable doubt. However, the State's argument in this regard is reliant completely on the State's prior, and erroneous, assertion that Mr. Hochrein's stipulation regarding the duration of his no-contact order somehow subsumed the separate requirement of notice.

For the reasons previously articulated herein, as well as those presented in the Appellant's Brief in this case, the record demonstrates that Mr. Hochrein never stipulated to having received prior notice of the order and that there was actually no evidence presented by the State in this regard. *See* Point I *supra*; Appellant's Brief, pp.22-26.) As such, the State's evidence could not be both overwhelming and uncontested, as there was no evidence to support this element presented to the jury at all.

CONCLUSION

Mr. Hochrein respectfully requests that this Court reverse his conviction for felony violation of a no-contact order with prejudice because the State presented insufficient evidence to sustain this conviction. In the alternative, Mr. Hochrein asks that this Court reverse his judgment of conviction and sentence for felony violation of a no-contact order and remand this case for further proceedings.

DATED this 26th day of April, 2012.



SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of April, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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